

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 17 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CLINTON WADE LAMERE,

Defendant - Appellant.

No. 04-30178

D.C. No. CR-03-00081-SEH

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Montana
Sam E. Haddon, District Judge, Presiding

Submitted February 10, 2006^{**}
Seattle, Washington

Before: LEAVY, RYMER and FISHER, Circuit Judges.

Clinton Wade Lamere appeals his jury conviction of one count of aggravated sexual abuse in violation of 18 U.S.C. §§ 1153(a) and 2241(a)(1). Because the parties are familiar with the facts, we do not recite them in detail. We affirm.

^{*}This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**}This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Lamere claims his indictment must be dismissed because its failure to include a definition of “sexual act” rendered it incapable of informing him of the particular elements of the charged crimes. We construe the indictment liberally in favor of validity where, as here, the defendant did not challenge the indictment’s sufficiency prior to conviction. *See United States v. Pheaster*, 544 F.2d 353, 361 (9th Cir. 1976).

Lamere’s indictment, which charged him with aggravated sexual abuse, in violation of 18 U.S.C. §§ 1153(a) and 2241(a)(1), and sexual abuse of a minor, in violation of 18 U.S.C. §§ 1153(a) and 2243(a)(1), included the elements of the charged offenses, provided notice of the charged crimes and enabled him to plead double jeopardy. *See Hamling v. United States*, 418 U.S. 87, 117 (1974). Both counts identified Lamere as someone within the territorial jurisdiction of the United States who knowingly engaged in a sexual act on or about a specific date, in a specific place, with a specific person identifiable to Lamere, in a specific way, in violation of particular statutes.

Read in its entirety, construed according to common sense and interpreted to include facts that are necessarily implied, Lamere’s indictment sufficiently informed him of the elements of the charged crimes. *See United States v. Anderson*, 532 F.2d 1218, 1222 (9th Cir. 1976). The indictment’s failure to

include a definition of “sexual act” did not render it insufficient. The case on which Lamere relies, *United States v. Crowley*, 79 F. Supp. 2d 138 (E.D.N.Y. 1999), was reversed by the Second Circuit and is not persuasive. *See United States v. Crowley*, 236 F.3d 104, 108 (2d Cir. 2000).

Lamere also argues that his trial counsel, J. Cort Harrington, provided ineffective assistance because he failed to file a motion to dismiss Lamere’s indictment prior to trial, an omission that purportedly prejudiced Lamere because he must now challenge his indictment under review for plain error, not de novo.

“[T]he customary procedure in this Circuit for challenging the effectiveness of defense counsel in a federal criminal trial is by collateral attack on the conviction under 28 U.S.C. § 2255, and this Court has been chary of analyzing insufficiency of counsel claims on direct appeal.” *United States v. Hanoum*, 33 F.3d 1128, 1131 (9th Cir. 1994) (internal citation and quotation marks omitted) (alteration in original). However, this court will “review ineffective assistance claims on direct appeal where the record is sufficiently developed to permit review and determination of the issue, or the legal representation is so inadequate that it obviously denies a defendant his Sixth Amendment right to counsel.” *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1060 (9th Cir. 2000) (internal citations and quotation marks omitted).

Here, the record is sufficient for us to conclude that the legal representation provided to Lamere was not ineffective. His counsel's failure to obey the orders of this court in another case does not establish that he provided ineffective assistance to Lamere. Even if we were to find counsel's decision not to object to be unreasonable, it was not prejudicial: had a motion to dismiss the indictment been made and granted, the government could readily have brought a superseding indictment. Under these circumstances, Lamere's Sixth Amendment right to counsel was not violated.

AFFIRMED.